

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION**

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IN RE:

:  
: CHAPTER 11  
:

INTREPID USA, INC., and Jointly  
Administered Cases,

: CASE NO. 04-40416 (NCD)  
: 04-40462 (NCD)  
: 04-40418 (NCD)  
: 04-41924 -- 04-41988 (NCD)

Debtors.

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**OBJECTION OF DVI BUSINESS CREDIT CORPORATION,  
DVI FINANCIAL SERVICES INC., DVI BUSINESS CREDIT RECEIVABLES  
CORP III AND DVI RECEIVABLES XIX, LLC. TO THE  
DEBTORS' MOTION UNDER SECTION 1121(d) OF THE BANKRUPTCY  
CODE TO EXTEND EXCLUSIVE PERIODS OF THE DEBTORS  
TO FILE AND OBTAIN ACCEPTANCES OF PLANS OF REORGANIZATION**

DVI Business Credit Corporation, DVI Financial Services Inc., DVI Business Credit Receivables Corp III and DVI Receivables XIX, LLC (collectively, "DVI"), respectfully submit this Objection to the Debtors' Motion under Section 1121(d) of the Bankruptcy Code to Extend Exclusive Periods of Debtors to File and Obtain Acceptances of Plans of Reorganization (the "Exclusivity Extension Motion").

1. The Debtors' request for an extension of exclusivity through December 28, 2004 should not be granted because the Debtors have not shown sufficient cause for the extension and the requested extension is not consistent with the Stipulation between the Debtors, DVI, the Official Committee of Unsecured Creditors (the "Committee"), Todd J. Garamella ("Garamella") and related parties that was approved by this Court on March 23, 2004.

2. The Debtors' financial condition has improved significantly since entering chapter 11 and they present no basis for the extended exclusivity period they are seeking. As set

forth in DVI's memorandum of law, the circumstances of these cases present the opportunity for a swift exit from chapter 11 through an asset sale and any extension of exclusivity considered by the Court should be tailored exclusively to the likely closing date for such a transaction. For these reasons, DVI requests that exclusivity only be extended through September 30, 2004, the date that DVI originally agreed to allow for an extension of exclusivity.

3. The Debtors are indebted to DVI through a number of pre-petition secured loans with an aggregate outstanding balance in excess of \$62 million.

4. The Stipulation resolved all of the contested issues that were then presented in the Bankruptcy Court, as well as two separate federal court proceedings involving non-debtors. In addition, the Stipulation provided a detailed roadmap for the conclusion of these chapter 11 proceedings.

5. Among other covenants, the Stipulation provides (1) for the appointment of a new CEO and management team by the Debtors (Stipulation at ¶ 9, 10), (2) for the transition of Garamella's role to chairman and chief recapitalization officer of the Debtors, (Stipulation at ¶ 9, 10) and for a new Board of Directors of the Debtors (Stipulation at ¶ 12).

6. In addition, DVI released Garamella from all personal liability on a series of guaranties of the DVI debt, dismissed with prejudice its motion to dismiss these chapter 11 proceedings and rescinded all rights that DVI possessed under Stock Pledge Agreements that were executed by Garamella in connection with the loan transactions. DVI further agreed to subordinate its liens to a Debtor-In-Possession loan facility of up to \$20 million that was required by the Debtors in order to remain in operation.

7. The Stipulation created a framework that would enable the Debtors, through new management, to substantially reorganize the Debtors' operations and to improve the

Debtors' financial performance. As a result, upon consummation of the Stipulation and appointment of new management, the Debtors were poised to maximize the value of their estates with DVI's full and complete cooperation.

8. The Debtors, the Committee and DVI agreed to limit the time period in which the Debtors could propose a recapitalizing plan of reorganization. These parties agreed that "in no event, however, may the Recapitalization Period extend beyond the Outside Recapitalization Date", which is defined as September 30, 2004. Stipulation at ¶17. In the event the Debtors decided to pursue the recapitalization, on or before July 23, 2004, they were required to submit a binding commitment to DVI to fund the Recapitalization Amount. Stipulation at ¶17.

9. The Debtors never delivered the commitment for the recapitalization transaction to DVI. In fact, subsequent to the execution and approval of the Stipulation, the Debtors' primary focus has been to sell substantially all of their assets under Section 363 of the Bankruptcy Code. The Debtors did not retain an investment banker or other professional to assist in a recapitalization. Instead, they hired Jeffries & Company ("Jeffries") solely as an advisor in connection with an asset sale. By Court order dated May 12, 2004, Jeffries' retention was approved *nunc pro tunc* to April 1, 2004.

10. The results of the Debtors' financial performance subsequent to the date of the Stipulation demonstrate that the parties' agreement has reaped substantial value for all interested parties in these cases. Through new management, the Debtors have been able to reduce costs and increase revenue. They have been able to generate positive cash flow and have reduced the amount of their Debtor-In-Possession financing by \$6 million.

11. While the Debtors' sole exit strategy since retaining Jeffries has been to sell their assets, the Debtors now contend that they are exploring other possible exit strategies, including a recapitalization transaction that contravenes the Stipulation. The Debtors' focus should be to maximize the value of their assets through an asset sale under Section 363 of the Bankruptcy Code. Such a sale would likely generate proceeds sufficient to, at a minimum, satisfy the Debtors obligations to DVI and the DIP lender and provide for a significant return to unsecured creditors. The Debtors have not articulated any reason as to why this transaction cannot conclude promptly. As a result, the Court should limit any exclusivity extension allowed to September 30, 2004.

12. For these reasons, the Debtors do not present any cause for an extension of exclusivity under section 1121(d) of the Bankruptcy Code beyond September 30, 2004.

MASLON EDELMAN BORMAN & BRAND,  
LLP

By: /e/ Amy J. Swedberg  
Clark T. Whitmore, Esquire  
Amy J. Swedberg, Esquire  
3300 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402  
(612) 672-8200

and

KLEHR, HARRISON, HARVEY  
BRANZBURG & ELLERS LLP

Richard M. Beck, Esquire  
260 South Broad Street  
Philadelphia, PA 19102  
(215) 568-6060

Attorneys for DVI

Date: August 23, 2004

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**MEMORANDUM OF DVI BUSINESS CREDIT CORPORATION,  
DVI FINANCIAL SERVICES INC., DVI BUSINESS CREDIT RECEIVABLES  
CORP III AND DVI RECEIVABLES XIX, LLC. IN OPPOSITION TO THE  
DEBTORS' MOTION UNDER SECTION 1121(d) OF THE BANKRUPTCY  
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TO FILE AND OBTAIN ACCEPTANCES OF PLANS OF REORGANIZATION**

DVI Business Credit Corporation, DVI Financial Services Inc., DVI Business Credit Receivables Corp III and DVI Receivables XIX, LLC (collectively, "DVI"), respectfully submit this Memorandum in Opposition to the Debtors' Motion under Section 1121(d) of the Bankruptcy Code to Extend Exclusive Periods of Debtors to File and Obtain Acceptances of Plans of Reorganization (the "Exclusivity Extension Motion").

**INTRODUCTION**

DVI opposes the requested extension of exclusivity through December 28, 2004 because the extension is not consistent with the Stipulation between the Debtors, DVI, the Official Committee of Unsecured Creditors (the "Committee"), Todd J. Garamella ("Garamella") and related parties that was approved by this Court on March 23, 2004. In addition, the Debtors do not present sufficient cause for the extension. The Stipulation resolved a number of contested issues that existed in these cases and provided a detailed road map for the conclusion of the

Debtors' chapter 11 proceedings. The relief requested in the Exclusivity Extension Motion deviates from the terms and conditions of the Stipulation. Among other provisions relating to the conclusion of this case, the Debtors were required to confirm a recapitalizing plan of reorganization no later than September 30. In their motion, the Debtors contend that recapitalization is still an option, yet they have not even solicited any interest in this plan from likely investors. Instead, the Debtors' sole focus has been on a sale of their assets, an objective that certainly can be achieved well before the Debtors' proposed exclusivity termination date of December 28.

In addition, the Debtors provide no circumstances that amount to the required cause for the exclusivity extension they are seeking. The Debtors entered chapter 11 because they were in dispute with DVI regarding their default under their loan agreements with DVI, they faced recoupment by CMS and they were without any working capital financing. All of these issues have now been resolved. In fact, the Debtors' financial performance under new management for their past three reporting periods have exceeded management's projections by a wide margin. At present, the Debtors are generating positive cash flow and they have paid down their DIP financing by approximately \$6 million. They have streamlined their corporate infrastructure and closed unprofitable offices. As a result, even without the time frames included in the Stipulation, there is no cause to extend exclusivity to December 28.

Given their improved financial performance, the Debtors are now poised to reap substantial benefits for creditors, both secured and unsecured, and the Court should not permit the Debtors to remain in chapter 11 for an extended period of time and perhaps forego the best opportunity to realize a return for creditors. For these reasons, DVI requests that exclusivity

only be extended through September 30, 2004, the date which DVI originally agreed to allow for an extension of exclusivity.

### **FACTUAL BACKGROUND**

The Debtors are indebted to DVI through a number of pre-petition secured loans with an aggregate outstanding balance in excess of \$62 million. While the Debtors contend that they have been inordinately pre-occupied by DVI's motion to dismiss their original petitions, the motion was fully and completely resolved by the Stipulation in March. The Stipulation resolved all of the contested issues that were then presented in the Bankruptcy Court, as well as two separate federal court proceedings involving non-debtors. As a result, as of March 23, 2004, the Debtors cannot be heard to complain that they have been distracted by DVI's activities in this case. In fact, DVI has been fully cooperative in the Debtors' reorganization efforts since the Stipulation was approved.

In addition to resolving all of the issues then pending between the parties, the Stipulation provided a detailed roadmap for the conclusion of these chapter 11 proceedings. The Stipulation allowed for the appointment of a new CEO and management team by the Debtors and to transition Garamella's role to chairman and chief recapitalization officer of the Debtors. Stipulation at ¶ 9, 10. The Stipulation also provided for a new Board of Directors of the Debtors. Stipulation at ¶ 12.

In exchange for the reorganization of the Debtors' management, DVI agreed to substantial concessions in connection with its claims in this case. DVI released Garamella from all personal liability on a series of guaranties that he executed in favor of DVI. DVI dismissed with prejudice its motion to dismiss these chapter 11 proceedings and to rescind all rights that DVI possessed under Stock Pledge Agreements that were executed by Garamella in connection

with the loan transactions. DVI further agreed to subordinate its liens to a Debtor-In-Possession loan facility of up to \$20 million that was required by the Debtors in order to remain in operation. DVI agreed to accept a substantial compromise on its debt that would enable the Debtors to undertake a recapitalization, provided that the recapitalization was completed in accordance the Stipulation. Stipulation at ¶17. To the extent that the Debtors opted to sell all of their assets instead of recapitalizing their businesses, DVI further agreed to a similar and substantial compromise from the aggregate amount of DVI's debt. Stipulation at ¶ 19. The Stipulation created a framework that would enable the Debtors, through new management, to substantially reorganize the Debtors' operations and to improve the Debtors' financial performance. As a result, upon consummation of the Stipulation and appointment of new management, the Debtors were poised to maximize the value of their estates with DVI's full and complete cooperation.

The results of the Debtors' financial performance subsequent to the date of the Stipulation demonstrate that the parties' agreement has reaped substantial value for all interested parties in these cases. Through new management, the Debtors have been able to reduce costs and increase revenue. The Debtors' now project an enterprise value that would be sufficient to satisfy all secured claims and provide, at a minimum, a substantial distribution to unsecured creditors in these cases. The Debtors have been able to generate positive cash flow and have reduced the amount of their Debtor-In-Possession financing by \$6 million. The Debtors' new management has concluded a plan to close unprofitable and costly facilities. While the Debtors contend that there is more work to do, there are no remaining business reorganization strategies that need to be implemented.



In exchange for DVI's agreements in the Stipulation, DVI demanded, and the Debtors and Committee agreed, to a specific time frame in which the Debtors would either file a recapitalization plan of reorganization or sell their assets. Specifically, paragraph 18 of the Stipulation describes the recapitalization period as follows:

Provided there is not an uncured default on the DIP Loan to which the holder of the DIP Loan is entitled to exercise its remedies, or as otherwise consented to by Chairman in writing, the Debtors will not solicit offers or file pleadings, including a plan, to authorize the sale of all or substantially all of the assets of the Intrepid Companies (the "Sale Transaction") on or before July 23, 2004. Provided that Chairman or Debtors have received a binding commitment or commitments to fund the Recapitalization Amount, subject only to usual and customary conditions (but not including any conditions for due diligence) on or before July 23, 2004, the period within which Debtors will not solicit offers or file pleadings to authorize the sale of the assets of the Intrepid Companies shall be extended an additional 15 days to permit the filing of a plan of reorganization to effectuate the recapitalization. In the event that such a reorganization plan is filed within such period, the period within which the Debtors will not solicit offers or file pleadings to authorize the Sale Transaction without the written consent of the Chairman shall be further extended to September 30, 2004, within which Debtors and Chairman will seek to confirm the plan and pay DVI, Rec III and Rec XIX the Recapitalization Amount in cash. (The foregoing periods and any applicable extensions are referred to as the "Recapitalization Period".) In no event, however, may the Recapitalization Period extend beyond the Outside Recapitalization Date. (b) DVI and the Committee agree to support and consent to Debtors' motion for an order extending Debtors' 120 day and 180 day exclusivity periods to 162 days and 222 days, respectively. DVI and the Committee agree not to take any steps to file a motion to shorten the exclusivity period. (c) Chairman on behalf of himself and all entities owned or controlled by him agrees not to object to any settlement that the Committee and the Debtors may reach with DVI, Rec III and Rec XIX as to the amount of their claims unless such amount exceeds the Recapitalization Amount, plus interest from January 29, 2004, and further agrees that any objection will not in any manner relate to lender liability claims or claims on account of DVI's actions or conduct as a lender, including alleged breaches of contract or loan commitments, provided however that any such objection may relate to the amounts actually loaned by DVI or due to DVI, Rec III and Rec XIX, including the value of assets upon which loan amounts may be based. Stipulation at ¶18.

The timing of the proposed recapitalization was firmly established in the Stipulation. The Debtors, DVI and the Committee agreed that "in no event, however, may the Recapitalization Period extend beyond the Outside Recapitalization Date". As set forth in paragraph 17 of the

Stipulation, the “Outside Recapitalization Date” is defined as a date no later than September 30, 2004. To facilitate the Debtors’ opportunity to recapitalize, DVI further agreed to consent to an extension of exclusivity for the original three Debtors in these cases through September 30, 2004.<sup>1</sup> The Debtors were also authorized, with the consent of the Bankruptcy Court, to retain Manchester Companies or other investment bankers or similar professionals to aid in his recapitalization effort. Stipulation at ¶ 17. In the event the Debtors decided to pursue the recapitalization, on or before July 23, 2004, they were required to submit a binding commitment to DVI to fund the Recapitalization Amount. No such commitment was provided to DVI.

Subsequent to the execution and approval of the Stipulation, the Debtors’ primary focus has been to sell substantially all of their assets under Section 363 of the Bankruptcy Code. The Debtors did not retain an investment banker or other professional to assist in a recapitalization. Instead, they hired Jeffries & Company (“Jeffries”) solely as an advisor in connection with an asset sale. By Court order dated May 12, 2004, Jeffries’ retention was approved *nunc pro tunc* to April 1, 2004.

While the Debtors’ sole exit strategy since retaining Jeffries has been to sell their assets, the Debtors now contend that they are exploring other possible exit strategies, including a recapitalization transaction that contravenes the Stipulation. The Debtors’ focus at this point should be to maximize the value of their assets through an asset sale under Section 363 of the Bankruptcy Code. Such a sale would likely generate proceeds sufficient to satisfy the Debtors obligations to DVI and the DIP lender and provide for a significant return to unsecured creditors. The Debtors have not articulated any reason as to why this transaction cannot conclude

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<sup>1</sup> At the time of the Stipulation, the Subsidiary Debtors had not filed bankruptcy. Nonetheless, DVI will consent to extensions of exclusivity through September 30, 2004 with respect to the Subsidiary Debtors.

promptly. As a result, the Court should limit any exclusivity extension allowed to September 30, 2004.

### **ARGUMENT**

The Debtors should be required to adhere to the bargain they struck with DVI in the Stipulation and the Court should grant an extension of exclusivity only through September 30, 2004. Moreover, given the Debtors' substantially improved financial performance, there is simply no reason why the Debtors need to remain in chapter 11 through the end of 2004. As a result, the Debtors have not presented sufficient cause to grant the exclusivity extension that they are seeking. Exclusivity should only be extended through September 30, 2004.

#### **A. Standard of Review**

Under Section 1121(d) of the Bankruptcy Code, the Court, upon request of the party-in-interest, may increase the exclusivity periods provided for in Sections 1121(b) and (c) for cause. Generally, the party requesting the exclusivity extension bears the burden of establishing good cause. *In re Hoffinger Industries, Inc.*, 292 B.R. 639, 643 (8<sup>th</sup> Cir. BAP 2003). Cause requires a debtor to show a promise of probable success for reorganization and an extension of exclusivity may not be employed as a tactical measure to put pressure on parties-in-interest to yield to a plan they consider unsatisfactory. *Id.* While the Bankruptcy Appellate Panel considered a number of factors in *Hoffinger*, the panel noted that these factors may not be necessarily be relevant in every case. In determining whether an extension of exclusivity is appropriate, it is not the Court's function to add up the number of factors which weigh for or against an extension. *Id.* at 644.

In limiting a debtor's exclusivity, Congress intended to strike a balance with Section 1121(d) between the interests of debtors and creditors. *In re Tony Downs Food Co.*, 34 B.R.

405, 408 (Bankr. D. Minn. 1983). Moreover, the simple argument that the Debtor needs more time to develop a plan is not persuasive in deciding whether exclusivity should be extended. *Id.* Section 1121 does not create a deadline to file a plan. *Id.* The debtor is free to take as much time as needed. *Id.* Section 1121 merely adjusts the risk that other interested parties may file a plan if the debtor does not act within the exclusive period. *Id.*

**B. The Exclusivity Extension Motion Does Not Establish Sufficient Cause For The Extension Sought By The Debtors**

The record in this case does not establish cause for the exclusivity extension sought by the Debtors. First, by seeking the extension, and indicating that they may seek to recapitalize their businesses, the Debtors are attempting to amend the timing milestones set forth in the Stipulation. The Stipulation provides a recapitalization plan would need to be confirmed no later than September 30. DVI agreed to consent to an exclusivity extension only through this date.

Beyond the Stipulation, the Debtors' substantially improved financial performance and return to profitability mandates that the Debtors' chapter 11 cases be concluded promptly. The Debtors have been working with Jeffries on an asset sale since April and, given the Debtors' improved finances, there is no reason why a sale that generates a significant return on the Debtors' assets cannot conclude promptly. Further delay risks erosion of the value of the Debtors' assets. Market conditions could change and other external factors may develop that could detract from the present value of the Debtors' estates.

In the Exclusivity Extension Motion, the Debtors cite a number of reasons for the requested extension, but the general theme of the motion is that the Debtors need more time to formulate a plan. As noted in *Tony Downs Food Co.*, this reason alone is not sufficient to extend the exclusive period. This conclusion is further underscored by the fact that the essential terms of an agreement with DVI, the Debtors' largest secured creditor, were reached in March.

Despite substantial improvement in the Debtors' financial performance, the Debtors now propose an extended trip through chapter 11 that is not warranted by the facts and circumstances of this case. This record does not establish cause for an exclusivity extension beyond September 30.

### **CONCLUSION**

For the above-stated reasons, DVI opposes the extension of exclusivity beyond September 30, 2004.

MASLON EDELMAN BORMAN & BRAND,  
LLP

By: /e/ Amy J. Swedberg  
Clark T. Whitmore, Esquire  
Amy J. Swedberg, Esquire  
3300 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402  
(612) 672-8200

and

KLEHR, HARRISON, HARVEY  
BRANZBURG & ELLERS LLP

Richard M. Beck, Esquire  
260 South Broad Street  
Philadelphia, PA 19102  
(215) 568-6060

Attorneys for DVI

Date: August 23, 2004

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**ORDER**

Upon the Debtors' Motion under Section 1121(d) of the Bankruptcy Code to Extend Exclusive Periods of Debtors to File and Obtain Acceptances of Plans of Reorganization (the "Exclusivity Extension Motion"), the Objection of DVI Business Credit Corporation, DVI Financial Services Inc., DVI Business Credit Receivables Corp III and DVI Receivables XIX, LLC and all other objections or responses on the record,

IT IS HEREBY ORDERED

The Debtors' Exclusivity Extension Motion is denied in its entirety.

Dated: \_\_\_\_\_, 2004

UNITED STATES BANKRUPTCY COURT

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The Honorable Nancy C. Dreher  
United States Bankruptcy Judge

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**UNSWORN CERTIFICATE OF SERVICE**

Susan Sjodahl, of the City of Minneapolis, County of Hennepin, in the State of Minnesota says that she is a secretary in the office of Maslon Edelman Borman & Brand, LLP, located at 3300 Wells Fargo Center, Minneapolis, Minnesota, and that on August 23, 2004, she made service of the following documents:

1. Objection of DVI Business Credit Corporation, DVI Financial Services Inc., DVI Business Credit Receivables Corp III And DVI Receivables XIX, LLC to the Debtors' Motion Under Section 1121(D) of the Bankruptcy Code to Extend Exclusive Periods of the Debtors to File and Obtain Acceptances of Plans of Reorganization;
2. Memorandum of DVI Business Credit Corporation, DVI Financial Services Inc., DVI Business Credit Receivables Corp III And DVI Receivables XIX, LLC in Opposition to the Debtors' Motion Under Section 1121(D) of the Bankruptcy Code to Extend Exclusive Periods of the Debtors to File and Obtain Acceptances of Plans of Reorganization;
3. Proposed Order; and
4. Certificate of Service.

upon the persons listed on the attached service list by transmitting the same via facsimile on August 23, 2004, at Minneapolis, Minnesota and addressed to said persons as indicated on the attached service list.

/e/ Susan Sjodahl  
Susan Sjodahl

## SERVICE LIST

### Facsimile Service

Faye Knowles  
Clinton E. Cutler  
Fredrikson & Byron, P.A.  
4000 Pillsbury Center  
200 South Sixth Street  
Minneapolis, MN 55402  
Fax: 612-492-7077

Intrepid Board of Directors  
c/o Joseph Anthony  
3600 Wells Fargo Center  
90 South 7<sup>th</sup> Street  
Minneapolis, MN 55402  
Fax: 612-349-6969

Brenda Lile  
MCKESSON INFO. SYS.  
1550 E. Republic Road  
Springfield, MO 65804  
Fax: 417-874-4015

Robert Raschke  
U.S Trustee  
1015 U.S. Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415  
Fax: (612) 664-5516

Intrepid USA, Inc.  
Attn: Todd J. Garamella  
6600 France Ave. S #510  
Edina, MN 55425  
Fax: (952) 928-9795

Michael P. Massad, Jr.  
Steven T. Holmes  
Hunton & Williams, LLP  
Energy Plaza, 30/F  
1601 Bryan Street  
Dallas, Texas 75201-3402  
Fax: 214-880-0011

Todd J. Garamella  
c/o John McDonald  
2800 LaSalle Plaza  
800 LaSalle Avenue  
Minneapolis, MN 55402  
Fax: 612-339-4181